

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 15, 2008

ROBERT P. KEENAN, ET AL. v. DENNIS R. DeLEMONS, ET AL.

**Appeal from the Chancery Court for Cheatham County
No. 12522 George Sexton, Chancellor**

No. M2007-2503-COA-R3-CV - Filed September 19, 2008

The issue in this case is whether the trial court correctly granted summary judgment to the buyers of a parcel of land, thus requiring the sellers to execute a warranty deed transferring the property to the buyers on the ground that the sellers failed to timely exercise their option to repurchase the property as provided in the contract. We agree with the trial court that the unambiguous language of the parties' contract provided that the sellers had 18 months from the date that sewer service was made available to the property to exercise their option to repurchase the land. Because it is undisputed that the sellers did not timely exercise the option, it expired, and the sellers are required to comply with the contract and execute and deliver to the buyers a warranty deed for the property. The trial court's grant of summary judgment in favor of the buyers is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and ANDY D. BENNETT, J., joined.

Jerry W. Hamlin, Ashland City, Tennessee, for the Appellants, Dennis R. DeLemos and Patsy R. DeLemos.

Kristin Fecteau and John A. Beam, III, Nashville, Tennessee, for the Appellees, Robert P. Keenan and Debra B. Keenan.

OPINION

I. Background

On October 21, 1987, Dennis DeLemos and Patsy DeLemos ("Sellers") executed a "real estate contract with option to repurchase" with the Pen-Mar Company for approximately three acres of land ("the property"). Pursuant to the agreement, Sellers had an option to repurchase the property at the original purchase price as follows:

On the date that sewers are available, as defined by the supplier of said sewers, Pen-Mar has one year from that date to tie on to or connect to said sewer system. [Sellers] have the option to re-purchase said land from [Pen-Mar] for a period of 6 months from the ending of the years time which begins to run with the available date for sewers; and . . . [Sellers] have 6 months from the ending of the first six months time to close the re-purchase. That is to say that . . . [Sellers] have the option to re-purchase said land from Pen-Mar Company and may exercise that option at anytime within 6 months of the years time to tie on to sewers and have an additional 6 months to close the transaction.

The re-purchase price, if elected, shall be the same consideration as this contract states: being \$15,900.00.

The parties agree that if the option to re-purchase is not elected by [Sellers] that they shall execute and deliver a good and sufficient deed for said land in fee simple with general warranty and free from encumbrances.

The property is located in the community of Pleasant View in Cheatham County. Sewer lines were constructed and made available to the property on January 7, 2002, but the property was not connected to the sewer system until a later date.

After acquiring the property, Pen-Mar conveyed the property to Charles Marquiss, who later conveyed it to Robert P. Keenan and Debra B. Keenan, the plaintiffs/counter-defendants in this action.

The Keenans brought this action on May 19, 2005 as a complaint for specific performance, alleging that Sellers never exercised their option to repurchase and that it had expired, and requesting the trial court to order Sellers to execute and deliver a warranty deed to the property to them as required by the contract. Soon after the Keenans brought their action, Sellers filed an action for declaratory judgment alleging that "it was never their intention to lose ownership or control of that property and that in fact [they] allowed the owners of Pen-Mar Company to use [their] property in order to meet compliance for sub-surface drainage and sewage which were necessary in order to operate the Pen-Mar Shopping Center," and asking the trial court to determine the parties' rights and obligations under the contract. The actions were subsequently consolidated by agreed order.

Sellers alleged that although sewer lines were constructed to connect the property to the municipal sewer service, it was not done until July of 2003, approximately 18 months after sewer service was first made available and therefore not within the one year period provided by the contract. It appears undisputed that sewer lines were constructed to connect the property and that the construction and connection of the lines was not completed within one year from January 7,

2002, but the exact date it was completed is not in the record. Sellers also argued that the contract was not a sales contract, but rather a transfer of a “temporary septic tank easement.”

The Keenans argued that the contract did not provide for any remedy or other consequence of failing to complete the sewer tie-in process within one year and that Sellers never exercised their option to repurchase within the 18 months after sewer service became available, and the contract made specific provision for that eventuality: the expiration of the option. There is no indication in the record that Sellers ever attempted to exercise their option to repurchase the property.

Following discovery, the Keenans moved for summary judgment. After a hearing, the trial court granted summary judgment in the Keenans’ favor, finding that Sellers’ failure to exercise their option to repurchase within the period provided by the contract resulted in the expiration of the option and granted the Keenans specific performance on the contract.

II. Issue Presented

Sellers appeal, raising the issue of whether the trial court erred in granting the Keenans summary judgment.

III. Standard of Review

This case involves the interpretation of the parties’ contract. “The interpretation of written agreements . . . is a matter of law that this Court reviews de novo on the record according no presumption of correctness to the trial court’s conclusions of law.” *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006).

Our standard of review of a summary judgment was recently restated by the Tennessee Supreme Court as follows:

Summary judgment is to be granted by a trial court only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.03; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). In reviewing the record to determine whether summary judgment requirements have been met, we must view all the evidence in the light most favorable to the non-moving party. *Eyring v. Fort Sanders Parkwest Med. Ctr., Inc.*, 991 S.W.2d 230, 236 (Tenn. 1999); *Byrd*, 847 S.W.2d at 210-11. We review a trial court’s grant of summary judgment de novo, according no presumption of correctness to the trial court’s determination. *Blair*

v. *W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Godfrey*, 90 S.W.3d at 695.

Boren v. Weeks, 251 S.W.3d 426, 432 (Tenn. 2008).

IV. Analysis

Sellers offered their own deposition testimony, and the affidavit of one of the two partners composing the Pen-Mar partnership that bought the property, in support of their argument that the parties actually intended the contract to be for a septic tank easement rather than a sale. The threshold question for the court, then, is whether the contract is ambiguous, so that such parol evidence would be admissible. The parol evidence rule provides that parol evidence “is inadmissible to contradict, vary, or alter a written contract where the written instrument is valid, complete, and unambiguous, absent fraud or mistake or any claim or allegation thereof.” *Airline Const. Inc. v. Barr*, 807 S.W.2d 247, 259 (Tenn. Ct. App. 1990); 32A C.J.S. *Evidence* § 851 at 213 (1974); Tenn. Code Ann. § 47-2-202; see *Littlejohn v. Fowler*, 45 Tenn. (Coldwell) 284 (1867); *Marron v. Scarbrough*, 314 S.W.2d 165 (Tenn. Ct. App. 1958).

In *Watson*, the Supreme Court provided the following guidance for the interpretation of written agreements:

A cardinal rule of contract interpretation is to ascertain and give effect to the intent of the parties. *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005). In interpreting contractual language, courts look to the plain meaning of the words in the document to ascertain the parties’ intent. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 889-90 (Tenn. 2002). This Court’s initial task in construing the lease at issue is to determine whether the language is ambiguous. *Id.* at 890. If the language is clear and unambiguous, the literal meaning controls the outcome of the dispute. *Id.* If, however, the words in a contract are susceptible to more than one reasonable interpretation, the parties’ intent cannot be determined by a literal interpretation of the language. *Id.*

Contractual language “is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one.” *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975).

Watson, 195 S.W.3d at 611.

The trial court held that “[b]ecause the contract is not ambiguous, the Court is bound to determine the intent of the parties based on the four corners of the document.” We agree with the trial court that the contract is unambiguous and thus parole evidence is inadmissible. The essential and operative terms as pertinent to this case are contained in the agreement as follows:

On the date that sewers are available, as defined by the supplier of said sewers, Pen-Mar has one year from that date to tie on to or connect to said sewer system. *[Sellers] have the option to re-purchase said land from [Pen-Mar] for a period of 6 months from the ending of the years time which begins to run with the available date for sewers*; and said [Sellers] have 6 months from the ending of the first six months time to close the re-purchase.

* * *

The parties agree that if the option to re-purchase is not elected by the [Sellers] that they shall execute and deliver a good and sufficient deed for said land in fee simple with general warranty and free from encumbrances.

(Emphasis added).

There is absolutely no support in the contractual language that the agreement was for a “temporary septic tank easement,” or, as argued in Sellers’ brief, that “the contract was a lease rather than a contract of sale.” The contract recites that Sellers agree to “sell and convey” the property and uses the word “re-purchase” numerous times to describe Seller’s option. The words of the contract are clear and not susceptible to more than one reasonable interpretation. The trial court provided the following reasoning supporting its judgment in its final order:

The Court finds that the intent of the parties can be determined by the title of the contract which is “Real Estate Contract With Option to Re-purchase.” In addition, the Court further finds the intent of the parties to this contract was to provide for a sale of the Property, with an option by the [Sellers] to buy it back, as evidenced by the word “repurchase” appearing twice [sic: eight times] in the contract.

The contract states that the Plaintiffs/grantees had one year to tie onto the sewer system when it became available. Plaintiffs/grantees did not tie on within one year of availability, but there is no penalty in the contract for failure to do so.

The contract does not require the Plaintiffs/grantees to give notice to the [Sellers] when the sewer system became available.

The [Sellers] who had six months to exercise their right to repurchase the land following [one year from the date of] availability of the sewer system failed to timely exercise their right to repurchase the Property. The contract does state a penalty for failing to exercise the right to repurchase, which is that the [Sellers] have to convey a warranty deed to the Plaintiffs/grantees.

We agree with the reasoning of the trial court. Although the parties could have provided a remedy or consequence for the failure to timely tie the property in to the sewer system, they did not include such a provision in their agreement. Under these circumstances, we are guided by the following statements of general contract interpretation principles:

Courts must determine and effectuate the intention of the parties to a contract as expressed in the four corners of the contract. *Moore v. Moore*, 603 S.W.2d 736, 738-739 (Tenn. App. 1980). Neither the parties nor the courts may create an ambiguity in the contract when no such ambiguity exists and then apply rules of construction to favor one party to the agreement. *Edwards v. Travelers Indemnity Co.*, 201 Tenn. 435, 441, 300 S.W.2d 615, 617-618 (1957).

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Courts may not make new contracts for the parties “under the guise of unwarranted interpretation.” *Central Drug Store v. Adams*, 184 Tenn. 541, 549, 201 S.W.2d 682, 686 (1947).

Rogers v. First Tenn. Bank Nat’l. Ass’n., 738 S.W.2d 635, 637 (Tenn. Ct. App. 1987).

The parties clearly agreed that in the event Sellers did not exercise their option to repurchase the property within the time provided, they would be obligated to “execute and deliver a good and sufficient deed for said land in fee simple with general warranty and free from encumbrances.” Because Sellers did not timely exercise their option to repurchase the property, the trial court was correct in ordering specific performance in accordance with the contract.

V. Conclusion

For the aforementioned reasons, the summary judgment of the trial court in favor of the Keenans is affirmed. Costs on appeal are assessed to the Appellants, Dennis R. DeLemos and Patsy R. DeLemos.

SHARON G. LEE, JUDGE